

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 511 of 1978

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

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SHAH RASIKLAL BHOGILAL

Versus

DAHVALAL SANKALCHAND

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Appearance:

MR MC SHAH for Appellant

MR DF AMIN for Respondent

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CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 24/01/97

ORAL JUDGEMENT

1. This is a Second Appeal under section 100, CPC, wherein the appellants are the original plaintiffs and the respondent is the original defendant. The plaintiffs had filed Regular Civil Suit No.71/71 for obtaining a declaration that the defendant had no right to discharge the rain water of the northern eaves of his house on the

property of the plaintiffs, and a permanent injunction restraining the defendant from discharging such rain water of the northern eaves of his house on the pump room and verandah of the plaintiffs. A further declaration was sought that the disputed Vandah wall was of the exclusive ownership of the plaintiffs and that the defendant had no right to encroach upon the said Vandah wall. In this context the plaintiffs had also prayed for a mandatory injunction directing the defendant to remove the two cupboards made in the kitchen portion in the said Vandah wall as also the Gokhala (open niche) in the said wall in the bathroom portion. The trial court framed issues at Exh.21 and after appreciating the evidence on record held against the plaintiffs on all counts and dismissed the suit. Thereupon the plaintiffs preferred Civil Appeal No.59/74 before the District Court.

2. The lower appellate court, after reappreciating the entire evidence on record, reversed the judgement and decree of the trial court by recording findings of fact to the effect that the plaintiffs had succeeded in proving that the disputed Vandah wall is of the exclusive ownership of the plaintiffs, that the defendant has encroached upon the said wall and that consequently the plaintiffs are entitled to a permanent injunction restraining the defendant from discharging rain water of the northern eaves of his house on the pump room and Vandah wall belonging to the plaintiffs.

3. However, the District Court found that looking to the nature of the encroachment, the plaintiffs would not be entitled to a mandatory injunction for removal of the encroachment. Thus, the lower appellate court partly allowed the appeal. The plaintiffs have therefore preferred the present appeal challenging the judgement and decree of the lower appellate court, whereas the respondent-defendant has filed Cross-Objections in the present appeal, challenging the findings of fact recorded by the lower appellate court.

4. I have heard the learned counsel for the respective parties on their respective contentions on the basis of and in respect of the findings recorded by the lower appellate court, and have also considered the relevant evidentiary material. As a result of the hearing and discussion during the course of submissions in the present Second Appeal, a consensus has been arrived at between the learned counsel for the respective parties, on the basis of which it appears to me that, on the facts and in the circumstances of the case it is not necessary to disturb the finding recorded by the lower

appellate court that the plaintiffs are not entitled to a mandatory injunction directing the defendant to remove the encroachment made in the plaintiffs' wall. However, in view of the fact that the finding of encroachment by the defendant in the plaintiff's wall is a legitimate and reasonable finding of fact, and therefore cannot be disturbed, it would be unreasonable and also contrary to law to deprive the plaintiffs of any compensation whatsoever for such encroachment. In the premises aforesaid, on the basis of the consensus referred to hereinabove, the learned counsel for the respective parties have specifically left the question of determination of this compensation to the Court.

5. Having due regard to the facts and circumstances of the case I find that an amount of Rs.7000/- would meet the ends of justice. Accordingly it is directed that the defendant shall pay the plaintiffs a sum of Rs.7000/- for having committed such an encroachment.

6. It is clarified that the findings of fact recorded by the lower appellate court are not disturbed and that the decree passed by the lower appellate court stands confirmed as modified (whereby it is directed that the defendant shall pay the plaintiffs a sum of Rs.7000/as compensation for the encroachment in question). As per the statement made by the learned counsel for the defendant it is directed that such payment shall be made not later than 25.3.1997. It is further clarified that such payment covers all the aspects of encroachment i.e. for having committed the encroachment in the past and also for permitting only this encroachment to remain in future. It is also understood that the defendant shall not make any further encroachment upon the said wall in future.

6.1 Decree accordingly.

7. Accordingly the present Appeal as also the Cross Objections therein stand disposed of with no order as to costs.

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